CHAPTER 20

MANAGEMENT OF LEGAL AFFAIRS

"I find it scarcely possible to get on without some legal person in the situation of Judge Advocate."

Duke of Wellington in letter to Earl of Bathurst, 1815

INTRODUCTION

The Army provides legal advice to commanders and soldiers, primarily through or under the supervision of judge advocates (JAs) of the Judge Advocate General's Corps (JAGC). JAs are soldier-lawyers who are commissioned officers of the Army and licensed attorneys. To use JAs and other legal resources effectively, commanders should understand the general organization and functions of the servicing staff judge advocate (SJA) or command judge advocate (CJA) office.

An Office of the Staff Judge Advocate (OSJA) is organic to units commanded by a general court-martial convening authority. An organization with a general officer in command may also be assigned an OSJA, even if there is no general court-martial convening authority. The OSJA has sections, such as military justice, administrative and civil law, claims, operations/international law, and legal assistance, and provides all legal services except those that must, by law, be independent, such as judicial and defense counsel support.

The SJA is a member of the commander's personal staff and, as such, communicates directly with the commander to provide legal advice for all matters affecting morale, good order, and discipline of the command. The SJA is also a member of the commander's special staff. As such, the SJA serves under the supervision of the Chief of Staff, provides legal services to the staff, and coordinates with other staff members to provide responsive legal services throughout the organization.

This chapter surveys essential JA functional areas: administrative and civil law, including environmental law, legal assistance, and claims; military justice; international/operational law; and contract/fiscal law.

ADMINISTRATIVE AND CIVIL LAW

The Army is an armed force, but it is also a large federal administrative agency that encounters significant internal and external legal issues every day. Administrative and civil law is the body of law containing the statutes,

regulations, and judicial decisions that govern the establishment, functioning, and command of military organizations. The practice of administrative and civil law includes advice to commanders and litigation on behalf of the Army involving many specialized legal areas, including military personnel law, government information practices, investigations, relationships with private organizations, labor relations, civilian employment law, military installations, regulatory law, intellectual property law, government ethics, and environmental law. Legal assistance and claims are major, essentially independent, subsets of administrative and civil law.

Corrective Administrative Personnel Actions.

Commanders spend an inordinate amount of their time on comparatively few soldiers. Some of these soldiers, for a variety of reasons, cannot or will not perform their duties; some are "troublemakers." Personal problems plague many that might otherwise be good soldiers.

Some corrective administrative actions educate, train, rehabilitate, or correct without adverse consequences. Others are adverse and implicate important legal rights and responsibilities. The procedures in Army regulations governing the use of adverse actions protect the legal rights of soldiers. These rules are also in the Army's interest as they ensure that commanders only impose adverse actions on soldiers who deserve them, and do so in a fair and lawful manner.

Corrective, Nonpunitive Actions Short of Separation. In many instances, commanders want to motivate soldiers to improve duty performance or be more efficient, or to ensure mission accomplishment. A number of useful administrative actions are available to deal with problem soldiers whose conduct or performance does not warrant action under the *Uniform Code of Military Justice (UMCJ)*, or administrative separation. These include counseling, extra training, written or oral reprimands, bars to reenlistment, adverse-performance evaluation reports, relief for cause, suspension or revocation of security clearance, suspension or revocation of on-post driving and other privileges, MOS reclassification, and administrative reduction for misconduct or for inefficiency.

Adverse Administrative Separations. The Army invests substantial assets in recruiting, training, equipping, and other resources when it transforms civilian men and women into soldiers. Separation before the end of an enlistee's obligated term of service wastes resources and requires expensive recruiting and training of a replacement. Moreover, the impact of adverse separations on soldiers can be severe, as some separations can result in discharges under other than honorable conditions. Senior commanders must understand the fundamentals of the administrative separation system. *AR 635-200: Enlisted Personnel* and *AR 600-8-24: Officer Transfers and Discharges*, are the Army regulations that govern administrative separations. These regulations specify the proper processes and provide substantive and procedural protections. Official roles in administrative separations vary. In some, commanders review the action and forward the file to the separation authority with recommendations. In others, they make the decision. Commanders should thus advise and educate subordinates on the correction or separation of problem soldiers. JAs are a resource for such leader development.

Improper Relationships.

Improper Superior-Subordinate Relationships. The Army recently revised its policy on relationships between soldiers of different ranks. See *AR 600-20: Army Command Policy*. This regulated conduct is considerably broader than the specific UCMJ offense of fraternization. Furthermore, these provisions of *AR 600-20* pertaining to improper relationships are punitive, thus violations of this lawful general regulation may be punished under Article 92, UCMJ.

Relationships between soldiers of different rank (without regard to the individuals' sex) are prohibited, if they (1) compromise, or appear to compromise, the integrity of supervisory authority or the chain of command (2) cause actual or perceived partiality or unfairness; (3) involve, or appear to involve, the improper use of rank or position for personal gain; (4) are, or are perceived to be, exploitative or coercive in nature; (5) create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

In addition, certain types of personal relationships between officers and enlisted personnel are prohibited. The term "officer," as used in the policy, includes both commissioned and warrant officers, unless otherwise stated. The policy applies to relationships between soldiers and also between soldiers and personnel of other military services. These prohibited relationships include:

- on-going business relationships between officers and enlisted personnel. This prohibition does not apply to landlord/tenant relationships or to one-time transactions such as the sale of an automobile or house, but does apply to borrowing or lending money, commercial solicitation, and any other type of on-going financial or business relationship. Business relationships that existed at the time this policy became effective, and that were authorized under previously existing rules and regulations, are exempt until 1 March 2000. [Note: In the case of National Guard or USAR personnel, the prohibition does not apply to relationships that exist due to civilian occupation or employment.]
- dating, shared living accommodations other than those directed by operational requirements, and intimate or sexual relationships between officers and enlisted personnel. This prohibition does **not** apply to:
  - marriages that predate the effective date of this policy or are entered into before 1 March 2000.
  - until 1 March 2000, relationships (dating, shared living accommodations, and intimate or sexual relationships) outside of marriage that predate the effective date of the policy.
  - situations in which a relationship that complies with this policy would move into non-compliance due to a change in status of one of the members (for instance, a case where two enlisted members are married and one is subsequently commissioned or selected as a warrant officer).
  - personal relationships outside of marriage between members of the National Guard or USAR, when the relationship primarily exists due to civilian acquaintanceships,

unless the individuals are on active duty (other than annual training) or full-time National Guard or USAR duty (other than annual training).

- personal relationships outside of marriage between members of the Regular Army and members of the National Guard or USAR when the relationships primarily exists due to civilian association and the reserve component member is not on active duty (other than annual training) or full-time National Guard duty (other than annual training). Soldiers and leaders share responsibility for ensuring that these relationships do not interfere with good order and discipline. Commanders must ensure that personal relationships that exist between soldiers of different ranks emanating from their civilian careers will not influence training, readiness, or personnel actions.

- Gambling between officers and enlisted soldiers.

These prohibitions are not intended to preclude normal team building associations that occur in the context of activities such as community organizations, religious activities, family gatherings, unit-based social functions, or athletic teams or events. Furthermore, all military personnel share the responsibility for maintaining professional relationships. In any relationship between soldiers of different grades or ranks, however, the senior member is generally in the best position to terminate or limit the extent of the relationship. Nevertheless, all members may be held accountable for relationships that violate this policy.

Commanders should seek to prevent inappropriate or unprofessional relationships through proper training and leadership by example. Should inappropriate relationships occur, commanders have available a wide range of responses. These may include counseling, reprimand, order to cease, reassignment, or adverse action. Potential adverse action may include official reprimand, adverse evaluation report(s), nonjudicial punishment, separation, bar to reenlistment, promotion denial, demotion, and courts martial. Commanders must carefully consider all of the facts and circumstances in reaching a disposition that is warranted, appropriate, and fair.

Army policy in *AR 600-20* also covers other prohibited relationships.

Improper trainee and soldier relationships. Any relationship between permanent-party personnel and trainees not required by the training mission is prohibited. This prohibition applies to permanent-party personnel without regard to the installation of assignment of the permanent-party member or the trainee.

Improper recruiter and recruit relationships. Any relationship between permanent-party personnel assigned or attached to the U.S. Army Recruiting Command (USAREC) and potential prospects, applicants, members of the Delayed Entry Program (DEP), or members of the Delayed Training Program (DTP) not required by the recruiting mission is prohibited. This prohibition applies to USAREC personnel without regard to the unit of assignment of the permanent-party member and the potential prospects, applicants, DEP or DTP members.

Fraternization, Article 134, UCMJ. Unlawful fraternization is a specific offense under the UCMJ, although most such cases will also involve violations of *AR 600-20*. Commanders should thus consult the SJA before acting on reports of this type of misconduct.

Standards of Conduct.

Ethical violations of standards of conduct impair the trust and confidence placed in officers by superiors and subordinates, and undermine the public's respect for the Army. *Standards of Ethical Conduct for Employees of the Executive Branch* went into effect in 1993. Published by the Office of Government Ethics (OGE), these standards are reprinted in and supplemented in the *Joint Ethics Regulations (JER), DOD 5500.7-R*. The JER also reprints other OGE regulations that govern the conduct of DOD personnel, and provides additional guidance and regulations on ethical issues, such as acceptance of travel benefits from non-federal sources.

Commanders are responsible for being familiar with the JER and its established standards of conduct. Commanders should ensure that all personnel are properly trained and fully aware of expected ethical conduct. The first commander (or civilian supervisor above the grade of GS-11) in the chain of command or supervision of a soldier or civilian employee serves as an "agency designee" under the JER, with responsibilities that may include:

- deciding important standards of conduct questions;
- ensuring that financial disclosure reports are timely and accurately filed;
- waiving conflicts not likely to affect the integrity of the Government; and
- determining that an individual employee may not acquire or hold a specific financial interest.

The Army General Counsel is the Army's Designated Agency Ethics Official. The Chief, Army Standards of Conduct Office, is responsible for overseeing the Army's ethics program and for ethics support for HQDA. Army commands, installations, and organizations should have an assigned ethics counselor.

Ethics counselors advise and assist with common ethics problems, such as gifts to superiors; acceptance of gratuities and benefits from outside sources; use of government facilities, property, and personnel for unofficial purposes; improper use of benefits received as a result of official travel; post-Government employment restrictions; and commercial solicitations. Ethics counselors represent the Army, and do not have an attorney-client relationship with the commanders and supervisors they advise.

Legal Basis of Command.

Command is the responsibility of the senior, regularly assigned officer present for duty, unless that individual is ineligible for command under Army regulations or preempted by the authority of the President. The term "command" has two distinct meanings. It describes the (1) authority of military officers over soldiers in their charge; and (2) legal aspects of the actions of a post commander as a manager of real property and activities occurring upon that property. This latter section has equal application to troop commanders in regulating activities of individual soldiers or units.

Command Authority. Commanders are vested with the authority to command by virtue of their military office. Commanders are responsible for the welfare of their command and the success of the mission, and have the authority to demand obedience to lawful orders.

The U.S. Constitution, laws, and regulations of higher authority determine the lawfulness of orders. Courts have described a commander's authority as "inherent" and "broad," and will defer to a commander's decision in an appropriate exercise of discretion. Nevertheless, courts insist that decisions be reasonable and consistent with law and regulation, not arbitrary or capricious.

Maintenance of Law, Order, and Discipline on Post. A commander may maintain law and order over civilians by the use of the Assimilative Crimes Act (ACA), 18 USC § 13, and the Federal Trespass Law, 18 USC § 1382.

The ACA provides that federal authorities, including military commanders, may sometimes "assimilate," i.e., apply, state criminal law. These circumstances include when a person commits a crime on an installation over which the United States exercises legislative jurisdiction, and where Congress has not specifically passed a law describing the conduct as a federal crime. This is a complex matter of law, policy, and civil-military relations; prudent commanders work closely with the SJA and other staff on these issues.

Under the Federal Trespass Law, a post commander may bar an individual from the installation when that person has committed a crime or has violated a post regulation. To bar, the installation commander must notify the individual in writing. The trespasser may be punished by a fine of not more than $500 or not more than six months' imprisonment, or both.

Free Speech and Dissent by Civilians. Most military installations are not considered "public forums" for First Amendment activity. The courts recognize the right of a commander to prohibit demonstrations and similar protests by civilians on military installations. Commanders may allow some speech, such as a lecture against drug-abuse, without opening the door to all speakers. The command must be able to state a rational basis for distinguishing between speakers. For example, the command may contend that the drug lecture supports the mission by helping to ensure a drug-free force; a lecture on ending U.S. military involvement overseas may erode command and control. Courts are likely to uphold such command decisions.

Free Speech and Dissent by Soldiers. The courts apply a similar analysis when reviewing command authority over soldiers' exercise of free speech. The UCMJ prohibits certain speech, such as disrespectful words and gestures toward superiors. Regarding other aspects of expression, the courts have not adopted an "area" approach in determining the extent of a commander's authority to limit a soldier's activities. They have insisted that any regulatory prohibitions specifically describe the prohibited activity. *AR 600-20* prohibits soldiers from participating in partisan or nonpartisan political meetings or rallies, picket lines or any other public demonstrations that may imply Army sanction of the cause. Unless commanders specifically permit, soldiers may not take part if:

(1) required to be present for duty elsewhere;
(2) in uniform, on a military reservation, or in a foreign country;

(3) the activities breach law and order, or;
(4) violence is reasonably likely to result.

Distribution of Literature on the Installation. Unlike demonstrations and protest activities, Army installations **are** open forums for news publications, even those critical of government policies or officials. The general rule is that literature is allowed on the installation, rather than kept off. Installation commanders must not attempt to control or restrict dissemination of publications, unless a publication constitutes a clear danger to military loyalty, discipline, or morale. Soldiers are entitled to the same free access to publications as are other citizens. Installation commanders may, however, require that distribution of printed media be made only through regularly established and approved distribution outlets, such as Post Exchanges. An exception is available if those seeking distribution obtain prior approval from the commander or authorized representative.

Commanders must weigh literature restrictions against the standard of "clear danger to loyalty, discipline, and morale." If it appears that a publication presents a "clear danger" to the loyalty, discipline, or morale of soldiers, the installation commander may delay distribution subject to review for final decision by HQDA. Some have challenged words such as "clear danger to loyalty, discipline, and morale" as vague, on the grounds that they fail to give adequate notice of the type of conduct prohibited, and thus violate the Fifth Amendment of the Constitution. The Supreme Court, however, recognizes a difference between freedom of expression in the military and in the civilian community.

The Commander's Regulatory Authority. Commanders may publish regulations and policies necessary to the functioning of their commands, as long as they are not arbitrary, capricious, or unlawful. Courts are willing to defer to a commander's assessment of the military necessity for a particular program, action, or rule, but the commander's action must have a reasonable basis in fact and the remedy must be reasonably related to problem.

Environmental Law.

Environmental protection poses an increasing challenge to military leaders. Environmental laws control all sources of pollution, and protect many natural and cultural resources. Under most environmental statutes, the Army is as much a member of the regulated community as any corporation. Commanders must integrate federal, state, and local environmental requirements within the defense mission.

Environmental Regulation of Military Installations. Until about 1970, the most environmental protection responsibility that Congress mandated for the military was to try to implement whatever measures were feasible in light of mission and resources. States were the operative agencies for cleaning up pollution, and the Constitution insulated federal entities from most state efforts to enforce state laws.

This isolation changed with the enactment of the *National Environmental Policy Act (NEPA), 42 USC §4321, et seq.* NEPA directed the Department of Defense (and all other federal agencies) to identify, quantify, and evaluate environmental impact before any federal undertaking, and to consider alternative courses of action. Although NEPA is a procedural, rather than substantive, statute, failure to properly

address its requirements can expose a command to injunctions that can restrict or entirely halt military operations.

Congress enacted numerous environmental statutes after NEPA. A common component of each statute was the federal government's ability to delegate the administration of the program to the individual states. The delegation of authority to the individual states and the waiver of sovereign immunity in some statutes potentially expose federal agencies to lawsuits if they fail to implement state laws. For example, recent changes to the Clean Air Act require all major sources of air pollutants within the United States, including most Army installations, to obtain a state-issued, facility-wide operating permit, or cease to operate without a presidential exemption. Army installations must submit detailed permit applications, which commanders must certify as true, accurate, and complete.

Almost all current federal environmental statutes require the Army to comply with an extensive complex of federal, state, and local laws in the:

- Installation, operation, and maintenance of air- and water-pollution control technology.
- Quantitative and qualitative limitations on air and water emissions.
- Pollution monitoring, record keeping, and reporting requirements.
- Operating permits for pollution sources and the payment of reasonable permit fees.
- Handling, transportation, storage, treatment, and disposal of solid waste and hazardous waste.
- Reporting and cleanup of spills.
- Monitoring virtually all underground storage tanks for leaks.
- Cleanup of active and closed hazardous-waste disposal sites.
- Conservation of endangered and threatened species and wetlands.

Compliance. Army compliance with environmental laws and regulations was once largely voluntary, but is no longer so. The *Federal Facility Compliance Act (FFCA) of 1992* expanded the waiver of sovereign immunity under *the Resource Conservation and Recovery Act (RCRA), 42 USC §6901, et seq*. The Federal Environmental Protection Agency (EPA) and state regulators can now assess punitive fines against federal agencies, including the Army, for violations of federal, state, and local solid- and hazardous-waste laws and regulations. Recent amendments to the *Safe Drinking Water Act (SDWA) 42, USC §300f*, make it the second major environmental statute to waive the federal government's sovereign immunity to punitive fines. In addition to punitive RCRA and SDWA fines, installations are subject to court-imposed penalties for failure to comply with court orders or court-approved consent decrees under other environmental laws. It should make no difference whether a regulator has the authority to impose a penalty, as Army installations are required to maintain compliance at all times or face enforcement actions that may prevent mission-essential training and operations.

Current environmental laws affect many daily activities at military installations, and enforcement of the laws is strengthening. Several installations have been assessed more than $1 million in fines and penalties for environmental violations. Moreover, federal environmental statutes specifically authorize individual citizens to act as private attorneys-general by initiating lawsuits to force compliance through injunctions and fines. Finally, Army leaders are not immune from

the threat of personal criminal liability for environmental crimes.

The FFCA is silent on the source of payment of fines and penalties, but Presidential, DOD, and DA policies provide installation or activity operational accounts of those most directly responsible for the violation will pay environmental fines. The policies are intended to motivate compliance at the lowest level by requiring those that are responsible for the violation to bear the burden of any resulting fines.

Commanders must handle environmental matters skillfully or risk substantial disruption of crucial training and other operations that may reduce combat readiness. Commanders who do not include environmental-protection strategies as a fundamental aspect of planning may find a court injunction standing in the way of their overall mission accomplishment. Finally, even relatively minor compliance problems can be costly to taxpayers, the Army, and local installations.

Pollution Prevention and Conservation. Army leaders must also stress pollution prevention and hazardous-material minimization. DOD policy is that ongoing operations should incorporate practices to reduce pollution and the use of hazardous materials. This approach should reduce overall costs to the Army, and promote environmental compliance.

Commanders are increasingly required to ensure that mission activities conserve natural resources on Army installations. The *Endangered Species Act (ESA), 16 USC §1531, et seq*., requires all federal agencies to carry out programs for the conservation of federally listed endangered and threatened species. The ESA prohibits taking any federal action that is likely to jeopardize listed species. Moreover, actions that may affect such species are subject to formal consultation with the U.S. Fish and Wildlife Service or the National Marine Fisheries. Commanders must also protect the quality and quantity of the installation water supply, conserve the water source, and seek to preserve wetlands that provide important habitat for fish and wildlife.

Federal Labor Relations and the Role of the Labor Counselor.

Unions represent many federal employees within the Department of the Army. Federal labor law requires the Army to notify unions before implementing changes in working conditions. Working conditions include, but are not limited to, changes in office hours, changes in shifts, major task/objective changes for the division/directorate, and reassignment of personnel. Commanders should consult the installation labor-relations specialists and labor counselors on all matters concerning unions or employees who are covered by collective bargaining agreements to ensure compliance with the existing negotiated labor agreement and applicable laws and regulations.

Good management-union relationships are essential. Through *Executive Order 12871, Labor-Management Partnerships*, the President charged each executive agency to create labor-management partnerships by forming labor-management committees and councils, and by providing partnership training. In recent years, DOD installations have successfully dealt with a wide range of issues through labor-management partnerships, including compressed schedules, childcare, downsizing, and alternative dispute resolution programs.

The installation labor counselor, a JA or an Army civilian lawyer, is the primary adviser to the commander, supervisor, and the

Civilian Personnel Advisory Office (CPAC) on legal aspects of civilian personnel and labor relations.

The labor counselor's duties include review of proposed adverse civilian personnel actions and pending equal employment opportunity (EEO) complaints; participating in contract negotiations with labor unions, particularly when opposing lawyers are involved; representing management in third-party proceedings, such as bargaining-unit determinations, unfair-labor-practice complaint proceedings, Equal Employment Opportunity Commission hearings, Merit System Protection Board hearings, arbitration hearings; advising activity negotiating committees; and advising on interpretation and application of negotiated labor agreements. Installation labor counselors are also designated by *AR 27-40: Litigation*, as the activity liaison officers for Office of Special Counsel investigations concerning allegations of prohibited personnel practices and whistle-blower reprisal.

Discipline of Civilian Employees. Commanders will likely supervise numerous federal civilian employees or command those who do. The Army's regulation on civilian employee discipline, *AR 690-700: Personnel Relations and Services* (Chapter 751), establishes two categories of disciplinary actions. The first is informal disciplinary action. This includes oral admonishments, oral counseling, and written warnings. The second category, formal disciplinary actions, includes letters of reprimand, suspensions, reductions in grade or pay, and removal. Similarly, employee conduct requiring discipline falls into two categories, corrective and punitive. Corrective discipline includes behavioral offenses for which progressive discipline, aimed at correcting the behavior is appropriate. Punitive measures are appropriate for more serious matters, such as fraud, waste, and abuse.

Informal discipline is appropriate for most minor unacceptable behavior. Supervisors take informal action on their own initiative, and should advise the employee that continued misbehavior might result in formal disciplinary action.

Formal disciplinary action is appropriate because of the severity of conduct or when informal discipline for minor misbehavior has not worked. The CPO and the labor counselor advise and assist supervisors about appropriate penalties and related concerns.

The severity of the imposed penalty and the status and union affiliation of an employee determine the appeal rights available to the disciplined employee. If the employee raises a discrimination claim in conjunction with the appealed action, the appeal rights may vary. The Army defends disciplinary and performance actions in administrative hearings and federal court.

Civilian personnel laws and regulations also permit supervisors to take appropriate action against employees whose job performance is unacceptable.

Equal Employment Opportunity Allegations of Discrimination. One of the labor counselor's most important duties is advising the installation equal employment opportunity (EEO) officer and commander on equal employment opportunity. Civilian employees are protected by law, executive action, and regulation from discrimination based on race, color, sex, national origin, religion, age, disability, and sexual orientation. They are also entitled to be free from sexual harassment. Finally, civilian employees have

the right to complain about conduct they perceive to be discriminatory.

Deployment Considerations. The civilian work force is vital to mission accomplishment. Civilian employees accompany Army units in exercises and operations worldwide. Commanders should thus include the many legal issues of civilian employee support, administration, and discipline in deployment planning.

Legal Assistance.

The legal assistance program is designed to meet the continuing legal needs of soldiers and their families. Legal assistance also helps to support military readiness, high morale, discipline, recruiting, and retaining a quality force.

Mission. As stated in *AR 27-3: The Army Legal Assistance Program,* this program exists to assist soldiers and their families with personal legal affairs. JAs do that by meeting clients' needs for legal information and resolving their personal legal problems when possible.

The first part of the mission is preventive: legal-assistance officers inform soldiers and their families of legal pitfalls, issues, and services, so soldiers may avoid difficulties and unnecessary expense. The second part of this mission is providing legal assistance directly to eligible clients.

Readiness. One of the continuing lessons from deployments and operations is that leaders can do more to ensure that soldiers have their personal legal affairs in order. Troops request wills and powers of attorney at the last minute, while in staging areas or, literally, boarding aircraft. This detracts from scarce time needed for other critical tasks. Automation has assisted JAs in providing such services, but commanders can help unit readiness by ensuring that soldiers are ready to deploy. Routine legal assistance appointments can satisfy most soldiers' legal needs well before deployment.

Senior leaders often overlook their own personal and legal affairs. Soldiers preoccupied with such matters may not be effective; leaders with similar problems affect unit readiness and mission accomplishment.

Client Eligibility. Legal assistance adds to soldier morale and unit readiness. The authorization of personal legal assistance is subject to availability of legal resources. Generally, all Active Component (AC) and retired soldiers and their families are entitled to legal assistance as are, with some restrictions, Reserve Component (RC) soldiers and their families. In addition, Army civilian employees may be eligible for legal assistance if deploying, or in such matters as responding to reports of survey.

Client Services. Army legal offices provide legal assistance on many issues, including family law, wills, leases, contracts, powers of attorney, disputes with creditors, veteran reemployment rights, torts, taxes, and appeals of adverse efficiency reports or reports of survey findings.

Legal assistance may include notary services, legal counseling, telephone calls and letters on behalf of clients, and preparation of some legal documents. With command support, attorneys working in conjunction with unit tax assistance officers and Army Community Service (ACS) volunteers help soldiers prepare federal and state income tax returns, and also may provide electronic tax return filing services. Some legal offices help clients in local courts on uncontested or

simple legal matters , such as adoptions, uncontested divorces, or small claims. Where offered, eligibility for in-court representation is generally limited to soldiers in pay grades E-4 and below if they have substantial financial hardships.

Soldiers do not pay for Army legal assistance. If the legal assistance office cannot solve a legal problem, it will ordinarily refer the client to the appropriate local bar association so that the client can get a civilian lawyer. A recent positive development is the practice of referring such soldiers to RC JAs who provide legal assistance for retirement points without cost to the soldier. Furthermore, RC JA units and individuals often perform drill by supplementing legal assistance at AC legal offices.

Preventive Law. Preventive law—educating soldiers and their families to avoid personal legal problems—is an important mission under *AR 27-3*. Legal assistance offices do this by:

- Teaching soldiers, families, and military organizations about local consumer problems, such as businesses that charge excessive interest or sell shoddy merchandise.
- Alerting leaders to local legal problems, solutions, and, available legal assistance resources.
- Writing articles for installation newspapers.

Direct action against unscrupulous merchants is an effective method of solving widespread problems. The local Armed Forces Disciplinary Control Board can recommend placing establishments off-limits for a variety of reasons, including business practices that have an adverse effect on command health, discipline, or morale. The mere prospect of an off-limits sanction may cause businesses to treat soldiers fairly. Command cooperation and initiatives with local chambers of commerce and better-business bureaus often solve less serious cases and identify and fix systemic problems.

Claims

The Army Claims System investigates, processes, adjudicates, and settles claims on behalf of and against the United States world-wide under the authority conferred by statutes, regulations, international and interagency agreements, and DOD Directives. Categories of claims include claims for property damage of soldiers and other employees arising incident to service, torts alleged against Army or DOD personnel acting within the scope of employment, and claims by the United States against individuals who injure Army personnel or damage Army property. The Army's implementing regulation is *AR 27-20: The Army Claims System*.

The Claims System supports commanders by preventing distractions to the operation from claimants, promoting the morale of Army personnel by compensating them for property damage suffered incident to service, and promoting good will with the local population by providing compensation for personal injury or property damage caused by Army or DOD personnel.

Under The Judge Advocate General's (TJAG) supervision, the U.S. Army Claims Service (USARCS) administers the Army Claims System and designates area claims offices, claims processing offices, and claims attorneys. SJAs or other supervisory JAs operate each command's claims program and supervise the area claims office (ACO) or claims processing office (CPO) designated by USARCS for the command. ACOs and CPOs are the normal claims offices at Army

installations that investigate, process, adjudicate, and settle claims against the United States; and identify, investigate, and assert claims on behalf of the United States. Claims attorneys at each level settle claims within delegated authority and forward claims exceeding that authority to the appropriate settlement authority.

When the claim results from soldier misconduct, AR 27-20 permits deducting from the wrongdoer's pay to compensate the victim.

Command Authority and Judicial Review of Military Activities.

Federal courts have consistently held that control and operation of the military establishment are functions of the Executive and Legislative Branches, not the Judicial.Judges do not try to command or interfere unduly with military operations. Notwithstanding this fundamental judicial and political philosophy, no individual or organization is above the law.

Commanders should know what kinds of military decisions and activities federal courts will review; the extent the courts recognize the unique requirements and conditions of command; how to respond to a court order; internal command procedures for proper handling of court orders and other legal process; and DA requirements when a command is sued.

Scope of Judicial Review.

Courts defer to the military. In the important military case, Parker v. Levy, the U.S. Supreme Court remarked that: "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."

When the Constitution clearly confers a function to the Executive or Legislative Branch of government, the courts generally refrain from reviewing the merits of a controversy. Even where the Constitution is not specific, courts are reluctant to become involved in questions about the military. Most courts ask first whether the complaint alleges a violation of regulation, statute, or constitutional provision.

Failure to follow military regulations and statutes may result in judicial sanctions. Often courts decline to review claims that a regulation has been violated. Nevertheless, numerous decisions establish the principle that military officials may not legally ignore Army regulations in carrying out their mission. Failure to follow regulations in managing military personnel has been the single greatest cause of litigation involving the Army. Courts will generally view violations of regulations written for the benefit of the government as harmless but will overturn actions that violate regulations intended for the benefit of an individual

Denial of soldiers' constitutional rights usually leads to judicial intervention. The public and the courts recognize that soldiers are subject to a judicial code and other disciplinary standards different from those that apply to civilians. At the same time, soldiers do not waive all the protections of the Constitution merely because of their military status. Army violations of soldiers' rights to a limited form of free speech or to due process in courts-

martial and adverse administrative personnel actions have led to numerous lawsuits against commanders and other military officials.

Commanders may face individual liability for their acts. People usually sue the government to force it to act or to reverse an action previously taken. Frequently, these lawsuits allege that the decision maker violated the person's constitutional rights. A personal liability lawsuit seeks money damages from the defendant governmental officer.

The Department of Justice (DOJ) will represent most government defendants who act within the scope of assigned duties. Generally, military personnel cannot sue other military personnel for monetary damages arising out of duty-related conduct. Officers may be absolutely immune from suits or be entitled to a qualified immunity from suits by civilians. Officers sued for common law torts, such as assault and battery, are entitled to absolute immunity, if acting in the scope of their duties at the time. Officers sued for alleged constitutional violations generally only receive a qualified immunity. In cases involving constitutional violations, qualified immunity applies if constitutional guidelines are not clearly established or a reasonable person would not know that clearly established guidelines exist.

Response to Litigation. There are strict requirements for complying with federal court orders, notifying HQDA of lawsuits, and forwarding litigation reports from commands to the Army Litigation Division.

The primary objectives of JAs in litigation are early dismissal of lawsuits, minimizing interference with command activities by ongoing lawsuits, and insulating official defendants against suits for money damages. Many lawsuits continue for several years. Such litigation consumes enormous command time and resources, and can take a toll on the lives and careers of affected officers and their families.

MILITARY JUSTICE

Background. Military justice is more than merely criminal law in battledress. The purpose of military criminal law is to promote justice, assist in maintaining good order and discipline in the armed forces, and promote efficiency and effectiveness in the military establishment.

From Bunker Hill to Bastogne, the Army administered military justice under the Articles of War (AW). These AW, which George Washington and others had adopted from the British AW early in the Revolutionary War, traced their origins to Roman models that had been refined during the Renaissance. The AW had worked well enough for the British and continued to serve our own small army well for almost two centuries. Nevertheless, abuses noted during the massive mobilization of World War II led to calls for reform. In 1950, Congress passed the *Uniform Code of Military Justice (UCMJ)* to provide uniform rules for all services. The UCMJ is found at *Title 10, United States Code, Sections 801-946*, but the sections are commonly referred to as Articles 1 through 146 of the UCMJ. Pursuant to the constitutional authority as Commander-in-Chief, and the authority granted by Congress in the UCMJ, the President signed an Executive Order creating the *Manual for Courts-Martial, United States* (MCM). The MCM consists of a preamble, rules for courts-martial, military rules of evidence, punitive articles, and nonjudicial punishment (NJP) procedures. *AR 27-10, Military Justice*, is the implementing Army regulation.

Providing Military Justice Legal Services. TJAG is responsible for the overall supervision and administration of military justice within the Army. The commander is responsible for the administration of military justice in the unit, and must communicate directly with the SJA about military justice matters.

The SJA is responsible for military justice advice and services to the command. The SJA advises commanders concerning the administration of justice, the disposition of alleged offenses, appeals of nonjudicial punishment, and action on court-martial findings and sentences. The SJA also supervises the administration and prosecution of courts-martial, preparation of records of trial, the victim-witness assistance program, and military justice training.

JAs of the U.S. Army Trial Defense Service (TDS), under the supervision of the Chief, U.S. Army Trial Defense Service, i.e., **not** the SJA, advise and represent soldiers before courts-martial. TDS attorneys also represent soldiers in adverse administrative hearings.

Military judges of the U.S. Army Trial Judiciary, who are not within the local chain of command or technical chain of the SJA, preside at general and special courts-martial, promulgate rules of court, maintain judicial independence and impartiality, conduct training sessions for trial and defense counsel, and perform or supervise military magistrate functions (review of pretrial confinement and issuance of search, seizure, or apprehension authorizations).

Active Duty Jurisdiction.

As a result of the Supreme Court's 1987 ruling in Solorio v. United States, jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces, and not on whether the offense is service-connected. The Solorio ruling means that both the military and civilian authorities may have jurisdiction over a soldier who commits an offense off post. This is commonly referred to as concurrent jurisdiction. Army policy is not to prosecute soldiers for offenses if civilian authorities are prosecuting the same soldiers for similar offenses.

Jurisdiction over Reservists.

As a part of the Military Justice Amendments of 1986, Congress amended the UCMJ to extend jurisdiction over members of the RC during both active duty and inactive duty training. In short, RC soldiers are subject to the UCMJ for misconduct committed during training periods. One significant change allows the military more flexibility to exercise court-martial jurisdiction over reservists who commit crimes during weekend drill (Inactive Duty Training or IDT) and over members of the National Guard of the United States (ARNGUS) when in federal service.

Recognizing that IDT periods are brief, usually lasting only one weekend, the amendments provide for continuing jurisdiction during the entire period of IDT, including those short periods when the soldier is not physically present at the IDT site. Additionally, the government can involuntarily order to active duty (for Article 32 investigations, courts-martial, and NJP) RC soldiers accused of violating the UCMJ during a training period.

AC convening authorities should be familiar with changes in RC jurisdiction, because all general and special courts-martial are tried at the active duty post that supports the RC unit (including ARNGUS units when federalized). In addition, only the AC general

court-martial convening authority can authorize involuntary recall of an RC soldier to active duty for UCMJ action. The Secretary of the Army must give prior approval for the involuntary recall if pretrial restraint will be imposed or if there is possibility of confinement as the result of a court-martial sentence.

The Commander's Role.

The Commander's Prosecutorial Discretion. One of the commander's greatest powers in the administration of military justice is the exercise of prosecutorial discretion—deciding whether a case will be resolved administratively, or if referred to a trial, determining what level of court-martial is appropriate, or what the charge will be. Although commanders should seek advice from the SJA and review available investigative reports, the commander alone must ultimately decide. Commanders should resolve cases at the lowest level appropriate for the offense and the offender, a fundamental theme of military justice.

Military justice procedures are not always the best way to dispose of disciplinary problems. A variety of administrative alternatives exist, including:

- counseling;
- written or oral reprimands and admonitions;
- withdrawal of pass privileges;
- extra training;
- withdrawal or limitation of privileges (commissary, PX, on-post driving, etc.);
- alcohol and drug rehabilitation programs;
- administrative separations;
- officer and NCO evaluations;
- MOS reclassification;
- reduction for inefficiency;
- bar to reenlistment; and
- reassignment or transfer.

The decision to refer offenses to a court-martial is often difficult. When an apparently serious offense occurs, there may be pressure on a commander to "do something." Congressional inquiries and expressions of interest in the incident from higher command may tempt some to refer cases to trial to settle the matter. A case should not be referred to trial unless the convening authority finds reasonable grounds to believe that an offense triable by court-martial has been committed; the accused committed it; the specification alleges an offense; and a court-martial is warranted (*Rule for Courts-Martial 601(d)(1)*). If the crime is minor, NJP or administrative alternatives are generally a first consideration.

The standard for referral does not conflict with the lawful presumption of innocence surrounding the accused at a court-martial. The perceptive commander will find occasions when the accused's conduct satisfies the legal elements of a crime, but for reasons of compassion, interests of justice, or other considerations, punitive action is not required. Similarly, commanders must resist the temptation to avoid use of the military justice system in order to create a misleading statistical picture of morale and discipline. Serious crime should be prosecuted in accordance with the law.

The Commander and the Defense Function. Commanders should understand that our Constitution, laws, regulations, and ethical codes require defense counsel to represent their clients. Representation does not mean halfway measures, but zealous advocacy within the bounds of ethics and the law. Any suggestion by a commander that defense counsel do less is improper, and may lead to loss of authority to convene courts-

martial and to other adverse action. The defense counsel who does not fully and vigorously represent a client is professionally derelict under the UCMJ, and liable to punishment, as well as sanctions under *AR 27-26: The Army Rules of Professional Conduct for Lawyers*, and discipline by a state bar association.

Options Available to the Commander.

This section discusses the various measures for dealing with an accused before trial, and examines the various forums and administrative measures a commander may use.

Pretrial Restraint. Soldiers pending military justice action, including trial by court-martial, should ordinarily continue to perform duty (*AR 27-10*, para. 5-13a). If required to ensure the soldier's presence at trial or to prevent further serious criminal misconduct, the MCM allows pretrial restraint. As are any citizens, soldiers are presumed innocent until convicted. Pretrial restraint is not punishment, but is obviously a significant restraint on liberty. Because there is no military bail system, such restraint may not be more restrictive than necessary under the circumstances.

Nonjudicial Punishment (Art. 15, UCMJ). One of the most valuable disciplinary tools available to the commander is nonjudicial punishment. This option is proper in cases of minor offenses for which administrative measures are considered inadequate or inappropriate, unless it is clear that nonjudicial punishment is not sufficient to meet the ends of justice. There are three levels of nonjudicial punishment, each with increasing severity of punishment: Summarized, Formal Company Grade, and Formal Field Grade. Maximum punishments are listed in Table 3-1, *AR 27-10.* A soldier may demand trial by court-martial at any time before the commander imposes punishment. Commanders may find the details in the UCMJ, MCM, and *AR27-10*, but one occasionally misunderstood point is worth noting here. Soldiers who accept an Article 15 and do not demand trial by court-martial are not admitting guilt, but are merely agreeing to nonjudicial punishment procedures.

General Considerations in Referring Charges to a Court-Martial.

Be Objective. A court will consider the case objectively on its merits; commanders should do the same.

Act Promptly. Commanders and subordinates should act rapidly on reports of misconduct. The Army and accused soldiers are entitled to prompt disposition of allegations. Unexplained delays in the administrative processing of charges may result in the dismissal of charges for lack of speedy trial. Generally, the government should bring an accused to trial within 120 days of preferral of charges or imposition of pretrial restraint. If a soldier is in pretrial confinement, charges must be processed with due diligence, which may require bringing the soldier to trial even more quickly.

Ensure Evidence Supports Charges. No matter how convinced a commander may be of an individual's guilt, there will be no conviction if there is insufficient competent evidence. The convening authority must ensure that the

evidence warrants trial. Trial counsel assist commanders in evaluating evidence.

Consider the Individual. Commanders should select the option that fits the soldier and the offense, considering the background of the accused and the effect on the unit.

Summary Court-Martial (SCM). The SCM is the lowest level trial court in the military justice system, and is designed to dispose of minor offenses under simple procedures. It is composed of one commissioned officer, ordinarily of field grade.

SCM convening authority is generally vested in battalion-level and higher commanders. SCM can only try enlisted soldiers, and is sometimes used after an accused has been offered and refused nonjudicial punishment for the offense. An accused may also decline trial by SCM. The punishment powers of the SCM are listed in Figure 20-1.

Special Court-Martial (SPCM). The SPCM is the intermediate military court. The SPCM convening authority is usually a brigade-level commander. Figure 20-1 depicts the punishment powers of the SPCM.

SPCM membership normally consists of at least three members and a military judge, or solely of a military judge, if the accused so requests. If an enlisted accused requests, at least one-third of the court members must be enlisted.

SPCM also have trial counsel (prosecutor) and defense counsel. The trial counsel need not be a lawyer. The accused, however, has a regulatory right to representation at trial by an appointed military lawyer certified by The Judge Advocate General. As a matter of practice, both trial and defense counsel are usually qualified lawyers. At all courts-martial, the accused is entitled to representation by civilian counsel at no expense to the government. The accused may retain detailed military counsel in addition to a civilian attorney.

"BCD" Special Court-Martial. The "BCD" SPCM is the same type of court as the "regular" SPCM, except that this court-martial has the additional power to impose a bad-conduct discharge (BCD) as part of the sentence. Certain requirements must be met before such punishment may be imposed: a qualified defense counsel and a military judge must be detailed; and a verbatim record must be made. In the Army only a General Court-Martial Convening Authority (GCMCA) may convene a "BCD" SPCM.

TYPE	CONFINE	FORFEITURE	REDUCTION[1]	PUNITIVE DISCHARGE
SUMMARY	1 MO[2]	2/3 PAY PER MO (1 MONTH)	≥ E-5 ONE GRADE ≤ E-4 TO E-1	NONE
SPECIAL	6 MO[3]	2/3 PAY PER MO (6 MONTHS)	TO E-1	NONE
BCD SP	6 MO[3]	2/3 PAY PER MO (6 MONTHS)	TO E-1	BCD ENLISTED ONLY
GENERAL	SEE PART IV, MCM	ALL PAY AND ALLOWANCES	TO E-1	BCD (ENLISTED) DD (ENLISTED & WARRANT OFF) DISMISSAL (COMM OFF)

[1]ONLY ENLISTED SOLDIERS MAY BE REDUCED BY CM.
[2]A SUMMARY CM MAY IMPOSE CONFINEMENT AND HARD LABOR WITHOUT CONFINEMENT ONLY ON SOLDIERS IN GRADE OF E-4 AND BELOW.
[3]A SPECIAL CM MAY IMPOSE CONFINEMENT ONLY ON ENLISTED SOLDIERS.

Figure 20-1

General Court-Martial (GCM). The GCM is the highest trial court in the military justice system. Only a GCMCA, usually a commander at division-level or above, may convene a GCM, and then only upon the written pretrial recommendation of the SJA. GCM punishment is limited only by the maximum punishments for each offense found in Part IV of the MCM. A GCM may sentence soldiers to death, life imprisonment, or dishonorable discharge (DD). This court-martial is thus reserved for the most serious crimes. Any officer requiring trial by court-martial is also ordinarily tried by GCM, as only that court may sentence a convicted officer to confinement or dismissal.

GCM may consist of a military judge and not fewer than five members, or a military judge alone, if the accused so requests. The accused may elect trial by judge alone in all cases except those referred to trial as capital (with potential for the death penalty). A military judge is detailed to the court in all cases. As with SPCM and BCD-SPCM, an enlisted soldier is also entitled, on request, to trial before a court-martial panel that includes at least one-third enlisted members.

Trial and defense counsel, lawyers certified by The Judge Advocate General, represent the parties at all GCM.

Unless the accused waives the right, Article 32, UCMJ, requires that a GCM can only try charges that a field grade officer or an officer with legal training and experience has thoroughly and impartially investigated. The purposes of the investigation are to inquire into the truth of the charges, determine the correctness of the form of the charges, and to get information to decide the proper disposition of the case.

The accused and counsel are present during the investigation's hearings. The Article 32 investigating officer's recommendations are advisory only, and not binding upon the convening authority.

Administrative Elimination in Lieu Of Court-Martial. Not all misconduct warrants trial. Administrative elimination instead of court-martial may sometimes serve the interests of justice. *Chapter 10, AR 635-200: Enlisted Personnel Management System*, provides that enlisted soldiers

charged with an offense punishable by a BCD or dishonorable discharge may submit a request for discharge for the good of the service in lieu of trial by court-martial. The GCMCA is normally the approval authority for these requests.

Pretrial Agreements. The accused and the convening authority may agree that in return for the accused pleading guilty, the convening authority will either drop certain charges or limit the sentence the accused will serve. The agreement must be in writing, so that all parties and reviewing authorities know exactly what was agreed.

Unlawful Command Influence.

Article 37, UCMJ, makes it unlawful for a convening authority to attempt to influence the members of a court-martial as to the outcome of the trial. The dangers of unlawful command influence extend beyond the members of a court-martial. No officer mindful of the commissioning oath would intentionally interfere with the due process of law. Nevertheless, commanders must exercise great care that their actions not constitute or be construed as unlawful command influence.

Pretrial Stage. Commanders may personally investigate allegations or, in more serious cases, rely on the reports of law enforcement professionals such as Criminal Investigation Command (CIC) or military police. Commanders also have the authority to dispose of cases involving subordinates. This power includes the right to take any nonpunitive or punitive action authorized at their own or any inferior level of command. For example, a GCMCA may refer a case to a lower court-martial or not refer the case at all.

When taking punitive action, the commander acts in a judicial capacity and must make an independent determination that punishment is appropriate. For example, if a field-grade commander believes that a soldier's misconduct, if proven, deserves company-grade punishment, that commander can either impose the appropriate punishment personally or send the case to the company commander for disposition. The higher commander may not, however, send the case to the company commander with instructions to administer a company-grade Article 15 or impose a specific type of punishment, because that would prevent the subordinate commander from exercising independent discretion.

Commanders who believe that a case demands a more serious disposition than can be administered at their level may forward the case to a higher authority with a disposition recommendation. An accused is entitled to a fair and independent recommendation as to disposition at each level of command. A commander cannot have a fixed, inflexible policy regarding level of disposition, and cannot establish guidelines suggesting an "appropriate punishment" for any category of case. Subordinate commanders must be free to make an honest, independent assessment of how each case should be handled.

Although commanders may not direct subordinate commanders to impose designated punishments or to refer cases to courts-martial, they may exercise authority to dispose of certain cases in any lawful manner. For example, a senior commander may direct subordinates to forward all cases of alleged officer misconduct or all illegal drug cases with recommendations for disposition.

Trial Stage. Once trial begins, commanders usually are not actively involved beyond authorizing administrative support.

GCMCAs can grant immunity to witnesses to facilitate their testifying, but subordinate commanders should scrupulously avoid statements of favorable treatment or negotiating "deals" with witnesses or accused under circumstances that could be construed as involving a promise, express or implied, of immunity.

The most rare but egregious incidents of unlawful command influence are those that impact directly on the trial process by pressuring court members to convict or punish contrary to their actual conscience. It is, of course, criminal to subvert justice by putting command pressure on court members or witnesses.

The more common problem is actual or perceived discrimination against soldiers who participate as witnesses at a court-martial. Some subordinates, eager to obey their commanders, may read more into their superior's remarks than the superior intended. If they do that in military justice, the consequences could be grave. Appellate courts are not bound by the actual intentions of the commander, however noble. Unlawful command influence often results from the reasonable, if unintended, perceptions of subordinates. If subordinates reasonably misunderstand or misinterpret the superior commander's actions or statements in a manner that deprives an accused of a fair trial, unlawful command influence exists.

Post-Trial Stage. After trial, the commander has the opportunity to review the results of the trial, to approve or disapprove findings, and to approve, suspend, reduce, or defer the adjudged sentence. The SJA provides a written recommendation in all GCM and BCD-SPCM before convening authority acts.

Article 37 prohibits commanders from censuring, reprimanding, or admonishing any court-martial member, military judge, or counsel about the findings or sentence adjudged by the court, or about any other exercise of judicial duties. It also prohibits giving unfavorable evaluations or ratings to court members because of court-martial participation.

INTERNATIONAL/OPERATIONAL LAW

International law. International law is the application of international agreements, international customary practices, and the general principles of law recognized by civilized nations to military operations and activities. Within the Army, the practice of international law also includes foreign law, comparative law, martial law, and domestic law affecting overseas, intelligence, security assistance, counter-drug, and civil-assistance activities.

The SJA's international law responsibilities include implementation of the DOD Law of War Program, including law of war training, advice concerning the application of the law of war (or other humanitarian law) to military operations, and supervision of war crime investigations and trials; assistance with international legal issues relating to U.S. forces overseas, including the legal basis for conducting operations, status of forces agreements, and the impact of foreign law on Army activities and personnel; monitoring of foreign trials and confinement of Army personnel and their dependents; assistance with legal issues in intelligence, security assistance, counter-drug, and civil assistance activities; advice to the command concerning the development of international agreements; and legal liaison with host or allied nation legal authorities.

Operational Law (OPLAW). OPLAW is that body of domestic, foreign, and international law that directly affects the conduct of military operations. OPLAW tasks support the military decision-making process, the command and control, and sustainment of military operations. OPLAW encompasses the law of war and international stationing arrangements, but goes beyond these traditional international law concerns to incorporate all relevant aspects of military that affect the conduct of operations. The JAGC provides operational law, and legal support in six core legal disciplines: military justice, international law, contract and fiscal law, administrative and civil law, claims, and legal assistance in all operations.

The OPLAW JA supports the commander's military decision-making process by performing mission-analysis, preparing legal estimates, designing the operational legal support architecture, war-gaming, writing legal annexes, assisting in the development and training of Rules of Engagement (ROE), and reviewing plans and orders. The OPLAW JA supports command and control by advising and assisting with targeting, ROE implementation, and information operations, and by facilitating the delivery of legal support in the core legal disciplines.

The Center for Law and Military Operations (CLAMO) is a resource organization for land-based operational lawyers. Established at the Judge Advocate General's School (TJAGSA), CLAMO examines legal issues that arise during all phases of military operations and devises training and resource strategies to address those issues. CLAMO:

- is the JAGC's central repository for memoranda, lessons-learned and after-action materials of legal support for deployed Army and Marine Corps forces;
- supports JAs in the field by gathering and disseminating key lessons learned, building databases of legal issues encountered by deployed judge advocates, and creating guides to the Combat Training Centers and other successful OPLAW training;
- integrates lessons learned from operations into emerging doctrine and into the curricula of all relevant courses, workshops, orientations, and seminars held at TJAGSA; and ; and,
- sponsors conferences and symposia at TJAGSA for operational lawyers.

U.S. Forces Stationed Overseas Under a Status of Forces Agreement (SOFA).

A SOFA is an international agreement that defines the privileges and obligations of U.S. Forces deployed or stationed overseas. Members of the command must be thoroughly familiar with the SOFA and any supplements to that agreement. Key terms in any SOFA include:

- *Forces.* How inclusive is this term? Are civilians to be treated as members of the U.S. forces?
- *Civilian component.* Does inclusion depend upon nationality? Are certain classes of individuals, e.g., host country nationals, excluded from this definition?
- *Dependent*. How does the stationing arrangement define family members? Does the definition include only a soldier's spouse and children? Are the soldier's parents, grandparents, sisters, and brothers included?

Military Justice. Jurisdiction is the key consideration in military justice. The

SOFA must specify whether the sending state (United States) or the receiving state (host nation) possesses the authority to exercise jurisdiction over certain offenses. Ideally, the U.S. will have the exclusive right to exercise criminal jurisdiction over members of the U.S. forces, but host nations are usually reluctant to relinquish jurisdiction over more serious offenses. Typically, the host nation will retain the prerogative to exercise jurisdiction over crimes committed against its property or citizens.

Furthermore, although SOFAs generally do not address this issue, U.S. law does not permit trial by court-martial, in peacetime, of U.S. members of the civilian component or dependents.

Other areas of concern are double jeopardy, production of witnesses for courts-martial, searches and seizures, and host-nation confinement of members of the U.S. forces.

Administrative Law. The guiding principle governing administrative legal matters overseas is U.S. recognition of the territorial sovereignty of the host nation. U.S. forces are generally subject to the civil jurisdiction of the host nation and must comply with host-country law. Key provisions in SOFA establish entry and exit requirements; specify the facilities to be provided U.S. forces; establish requirements for the payment of customs, duties, and taxes; and indicate whether local labor laws will apply to civilians who are employed by the U.S. forces.

Overseas Procurement. Overseas procurement is the acquisition of supplies and services (including construction) by and for the use of U.S. forces stationed or deployed overseas. The U.S. should ensure that the stationing agreement stipulates that host-country law will not govern U.S. acquisitions. This enables the U.S. to resolve contractual disputes under U.S. law and avoids the requirement that U.S. lawyers become familiar with the contract law of each receiving state.

Contracting overseas depends upon the industrial and cultural climate of the receiving state. Members of the command must be familiar with the business environment within the receiving state to provide the commander with accurate and workable contracting advice.

Payment of Claims. SOFAs apply specific rules and procedures for the investigation, adjudication, and payment of claims overseas. Typically, SOFAs establish various categories of claims involving military and nonmilitary property and third-party claims.

In the absence of specific claims provisions within a SOFA, and in evaluating *ex gratia* payments [a common international legal term that means payments made as a favor, not by legal necessity], the Foreign Claims Act will apply to determine whether the foreign claim may be paid. The terms of this Act define who are proper claimants, the elements of foreign claims, the forms such claims may take, and the procedural requirements for processing such claims.

Legal Assistance. SOFAs generally do not address domestic-relations issues and consumer matters. The law of the receiving state or U.S. law will ordinarily apply. While members of the U.S. forces generally have access to the courts of the receiving state, language barriers and unfamiliarity with the legal remedies and procedural rules may limit effective recourse in foreign courts.

NATO - Partnership for Peace Status of Forces Agreement. In 1995, the

North Atlantic Council approved the Partnership for Peace (PFP) SOFA, which was thereafter ratified by the United States. The provisions of this agreement are essentially those of the NATO SOFA, with minor modifications. The PFP SOFA has entered into force for non-NATO PFP States such as Albania, Bulgaria, Czech Republic, Hungary, Latvia, the Slovak Republic, and Slovenia. The PFP SOFA will be effective for exercises conducted by US forces in countries that have ratified the agreement.

Deployment for Conventional Combat Missions.

The SJA is responsible for providing legal advice to the commander concerning the broad range of legal issues associated with the preparation for and deployment of U.S. forces on combat missions.

International Agreements. Members of the command must be familiar with international agreements, if any, in effect between the U.S. and that country to which U.S. forces are deploying and any countries with which the U.S. has overflight, transit, staging, or other arrangements.

Case Act. The Case Act (*1 USC § 112b*) limits the ability of members of the executive branch to negotiate agreements with foreign governments. The Act also requires that the Secretary of State transmit the text of written international agreements to Congress.

DOD Directive 5530.3: International Agreements delegates authority to negotiate and conclude international agreements to the Secretary of the Army and the Chairman of the Joint Chiefs of Staff (CJCS). The CJCS has delegated this authority to the unified command CINCs.

AR 550-51: Authority and Responsibility for Negotiating, Concluding, Forwarding, and Depositing of International Agreements implements the Case Act and DOD Directive for the Department of the Army and delegates, subject to certain restrictions, authority to negotiate and conclude agreements to the heads of staff agencies and MACOMs.

Legal Bases for U.S. Intervention. The commander should be aware of the legal bases for the use of U.S. forces abroad. These bases define, and possibly restrict, the objectives and execution of the operation. An operation to protect U.S. nationals, for example, could not be used to justify other military objectives. The legal bases for use of force or forces overseas include:

- protection of U.S. nationals;
- through collective self-defense, by treaty or request, assisting a state in resisting armed attack/aggression, to include externally-supported insurgent activity within a state;
- unilateral self-defense against armed attack undertaken against U.S. forces/property overseas;
- participation in properly authorized enforcement actions under Chapter VII of the UN Charter; and
- disaster relief and humanitarian assistance.

War Powers Resolution (WPR). Absent a declaration of war or specific congressional approval for use of U.S. forces abroad, the War Powers Resolution imposes consultation and reporting requirements and time constraints upon the President when

U.S. forces are introduced into actual or potential hostilities. Generally, Congress asserts in the WPR that the Congress must approve deployments falling within the purview of the WPR which last more than 90 days.

Review of OPLANs. Operational lawyers must become part of the planning team at each headquarters. They should review every operations plan, concept plan, contingency plan, and operations order during each step of the planning process. SJAs must focus on assisting commanders in developing plans that will enable them to accomplish the mission within the limits of the law. The following documents set forth the operational lawyer's role in the planning process.

DOD Directive 5100.77, The DOD Law of War Program, requires that all services ensure that their military operations comply with the law of war and designates the Secretary of the Army as the Executive Agent for implementing the Program. *Joint Chiefs of Staff Memorandum MJCS 59-8* provides that legal advisers should attend planning conferences for joint and combined operations and exercises involving Rules of Engagement (ROE) and related topics. The memorandum further provides that all plans, ROE policies, and directives should be consistent with the DOD Law of War Program. The joint command legal adviser should review these throughout their preparation.

FM 27-100: Legal Operations, provides valuable additional guidance concerning operational law issues and legal support during war and small-scale contingencies.

Rules of Engagement. ROE is a self-defining term, but the longer, official definition is that ROE are directives that a government may establish to delineate the circumstances and limitations under which its own military forces will initiate and/or continue combat engagement with enemy forces. (*JCS Pub. 1*: *Department of Defense Dictionary of Military and Associated Terms*). Each command will establish ROE consistent with guidance from higher headquarters. In the absence of superseding ROE, this guidance may be found in JCS standing ROE. See *CJCS Instruction 3121.01: Standing Rules of Engagement for U.S. Forces.*

Based on examination of the OPLANs and the command SOPs, the legal reviewer should be familiar with the operation and should consider the following questions:

- Is the right and obligation of self-defense sufficiently stressed?
- How are the ROE transmitted to the soldiers, and how are the soldiers trained? Does the Field SOP or the Tactical SOP advise soldiers how to act in various situations? Are cards and pamphlets or other tools available to guide soldiers' actions?
- Have situational training exercises been developed to train soldiers in the appropriate mix of initiative and restraint?
- Do the ROE or coordinating instructions cover:
  - Hostile forces, acts, and intent;
  - Use of chemical munitions, including herbicides, or CS and other riot control agents;
  - Use of nuclear munitions;
  - Use of booby traps;
  - ADA weapons status;
  - Employment of mines and mine fields, including scatterable mines (FASCAM);
  - Employment of electronic warfare (EW) assets;

- Employment of indirect fires and observers;
- Cross-border/boundary operations;
- Employment of special operations forces; and
- Transition ROE (threat/peace to hostilities).

Law of War. Commanders must be sensitive to law of war issues and must plan for providing instruction to the members of the command concerning the essential provisions of the Hague and Geneva Conventions, as well as other conventions and treaties. The following discussion highlights the areas of the law of war most critical to commanders.

Regulation of Hostilities. Three general principles form the foundation for this area of the law of war:

1. Military Necessity. This principle justifies those actions not forbidden by international law that are indispensable for securing complete submission of the enemy in the shortest period of time. This enables commanders to act in furtherance of the military mission (Para. 3, *FM 27-10, The Law of Land Warfare).*
2. Unnecessary Suffering. Military necessity does not allow the commander to employ arms, projectiles, or material calculated to cause unnecessary suffering (Para. 34, *FM 27-10*).
3. Proportionality. The loss of life and damage to property must not be out of proportion to the military advantage to be gained (Para. 41, *FM 27-10*).

In addition to the three principles stated above, commanders must be aware of the lawfulness of certain weapons, targets, stratagems, and reprisals (Para. 497, *FM 27-10*). The commander must be aware of the U.S. policies toward nuclear (Para. 35, *FM 27-10*), biological, and chemical weapons (*Executive Order No. 11850, 40 Fed. Reg. 16187* (1975); Para. 38, *FM 27-10*), including limitations on the use of riot control agents and herbicides in combat (Para. 38c, *FM 27-10*) (*Chemical Weapons Convention, 1993*), and additional protocols I & II.

Geneva Conventions. The 1949 Geneva conventions prescribe how commanders must treat prisoners of war (Chapter 3, FM 27-10), and sick and wounded on the battlefield and at sea (Chapter 4, FM 27-10). Commanders also have legal obligations to civilians in the area of operations. At division and above, commanders have an Assistant Chief of Staff, G-5 (Civil Affairs) to coordinate the political, social, cultural, and economics aspects of military operations in foreign areas. During deployments, organic assets may be augmented by Civil Affairs units, drawn mainly from the Reserve Components (see FM 41-10, Civil Affairs Operations)

War Crimes. Commanders have an affirmative obligation to investigate and report war crimes, and to discipline war criminals (*FM 27-10*). Further, under certain circumstances, commanders may be criminally liable for war crimes committed by their subordinates (*FM 27-10*).

Security Assistance Missions.

Security assistance consists of those statutory programs and authorities under which the U.S. may provide or regulate forms of assistance and sales to foreign governments

(and international organizations) for the purpose of enhancing U.S./mutual security.

The principal purpose of security assistance is to enhance U.S. strategic objectives through the implementation of regional and individual country programs. These programs are designed to assist allies and friendly countries in meeting their security threats, while U.S. interests are promoted by:

- securing en route access, overflight, transit, and base rights essential to rapid deployment;
- promoting force commonalities and interoperability;
- increasing U.S. geopolitical influence; and
- improving/maintaining access to raw materials.

The National Security Council establishes overall strategic planning and goals. Security assistance programs, as one means of accomplishing these goals, are managed by the Under Secretary of State for Security Assistance, Science, and Technology. The Under Secretary is responsible for coordinating security assistance plans and programs normally conducted by the U.S. military; he also chairs the Arms Transfer Management Group (ATMG), which provides policy planning and reviews security assistance matters.

Coordination is accomplished in a given nation by the U.S. Country Team. The team consists of representatives of all in-country U.S. government departments and includes a military officer who normally is in charge of the security assistance organization. The ambassador, as the President's personal representative, functions within the organization of the State Department and has full responsibility for directing and coordinating the activities and operations of all elements of the U.S. diplomatic mission. The CINC of an U.S. unified combatant command exercises authority, direction, and control over U.S. military forces within a particular country that are assigned or attached to that command.

Within DOD, the Under Secretary of Defense for Policy is the principal point of contact and policy spokesman for security assistance matters. The Director, Defense Security Assistance Agency (DSAA) is responsible for the day-to-day management, control, and implementation of approved and funded security assistance programs.

The Joint Chiefs of Staff (JCS) develop plans and systematically review ongoing security assistance programs for specific countries and geographical regions in order to ensure their compatibility with U.S. global security interests and to confirm that military assistance resources are being utilized in ways that promote U.S. strategic objectives.

The military departments develop, negotiate, and execute agreements pertaining to security assistance programs. They also provide logistical advice and resources and administrative support necessary to move assets to a recipient country.

CINCs are responsible for ensuring that all security assistance programs within their geographical areas of responsibility are coordinated, integrated, and in consonance with regional U.S. defense plans. The CINCs also identify and apply the security assistance resources required to achieve U.S. strategic goals at the regional level.

Component commands of unified commands participate in the planning and execution of security assistance programs and specifically perform the following functions:

- assist in the development and execution of long-range plans, to include foreign military sales;

- provide technical advice on weapons systems, tactics, doctrine, and information relative to logistics support, training, and technical assistance offered by Mobile Training Teams (MTTs) and Technical Assistance Teams (TATs);
- ensure component contingency plans and international activities undertaken in conjunction with allied and friendly forces (such as combined training exercises and standardization conferences) are correlated with security assistance programs and overall U.S. military objectives;
- advise on the capabilities and limitations of allied and friendly forces, to include their capability to operate effectively with U.S. Forces in support of U.S. contingency plans;
- advise on the organization, force objectives, and modernization programs of allied and friendly forces;
- stay informed of the item content of a particular country's security assistance program;
- provide advice and assistance directly to component sections in the Military Assistance Advisory Groups (MAAGs); and
- make field trips to assist in accomplishing the security assistance mission.

Role of the Operational Lawyer. Operational lawyers are prepared to advise commanders concerning the various security assistance and arms transfer programs. They can advise on applicable legislative and regulatory requirements and interpretations of law, in order to avoid legal difficulties and actual or perceived abuses of security assistance aims.

Security Assistance Programs. Congress appropriates security assistance funds to the State Department, which affects overall coordination of the security assistance process. Congress funds specific programs annually on a program-by-program and country-by-country basis, a reflection of the significant congressional interest and participation in security assistance.

The Foreign Assistance Act (FAA) (22 USC § 2151 et seq.), Part I, provides economic, agricultural, medical, disaster relief, and other forms of assistance to various countries. Part II of the FAA authorizes the U.S. to furnish security assistance to friendly countries and international organizations, upon request and after congressional approval.

Foreign Military Financing Program (FMFP) The purpose of FMFP is to enable U.S. allies and friends to enhance their self-defense capabilities through the acquisition of U.S. military articles, services, and training. The high cost of modern weapon systems means that FMFP is primarily a grant program. FMFP is the primary component of military assistance to other nations under the security assistance policy.

International Military Education and Training (IMET) (22 USC § 2347). IMET authorizes the President specific dollar amounts each fiscal year to furnish military education and training to military and related civilian personnel of foreign countries. This education and training may be provided in both the U.S. and abroad. IMET must foster mutually beneficial relations between the U.S. and participating countries, and improve the ability of participating countries to use their resources, including defense articles and services provided under FMFP.

Expanded IMET (22 USC § 2347). Expanded IMET permits the President to train foreign civilian officials with defense oversight responsibility and their military forces about human rights, the role of the military in a democracy, and effective military-justice systems.

Antiterrorism Assistance (22 USC § 2349aa, et seq.). This program authorizes the President specific dollar amounts each fiscal year to assist foreign countries in order to improve the ability of their law enforcement personnel to deter terrorist activities.

Economic Support Fund (ESF) (22 USC § 2346, et seq.). This program authorizes the President to provide, when U.S. national interests dictate, economic support in certain amounts or to certain countries. ESF is designed to promote economic or political stability in recipient countries, although ESF may not be used for military or paramilitary purposes.

Peacekeeping Operations (PKO) (22 USC § 2348, et seq.). This program authorizes assistance to friendly countries and international organizations for peacekeeping operations. This authority may be used to provide financial resources, equipment and supplies, or services.

Police Training Prohibition (Section 660, FAA, 22 USC § 2420) . The Army cannot use FAA funds to provide training, advice, or financial support to police, prisons, or other law-enforcement forces of a foreign government or for any program of internal intelligence or surveillance on behalf of a foreign government. Longtime democracies, with no standing armed forces and which do not violate human rights, are exempt from Section 660 prohibitions. Other countries may also enjoy specific legislative exemption. There are also narrow exceptions for training foreign police personnel who primarily engage in counterdrug activities.

Arms Export Control Act (AECA) (22 USC § 2751, et seq.). The AECA provides for the transfer of arms and other military equipment, as well as various defense services, through government-to-government agreements. AECA establishes the Foreign Military Sales (FMS) Program. Under this program, DOD purchases military equipment or services from U.S. firms or takes equipment from U.S. stocks (under limited conditions) and sells the equipment or services to a foreign government or international organization. The services of DOD personnel, such as training or management advice, may also be sold. Authority is provided for the leasing of defense articles in DOD stocks to eligible recipients. The AECA also authorizes the President to finance sales of defense articles and services or to guarantee financing to friendly foreign countries or international organizations. Note that the FMS program established under the AECA is not a grant program. Defense articles and services may not be provided to countries, under the AECA, on a nonreimbursable basis.

The AECA is subject to revision on an annual basis and contains complex and sensitive legislative requirements, prohibitions, and limitations. A principal example of this is Section 21 (c)(1), which prohibits personnel performing defense services under the AECA from any duties of a "combatant nature." This includes duties related to training and advising that may engage U.S. personnel in combat activities outside the U.S. This provision effectively bars U.S. military trainers or advisers from accompanying units from

AECA-recipient countries engaged in combat.

The Letter of Offer and Acceptance (LOA) is a document used to effect transfers under the AECA and details the status DOD personnel providing defense services to a particular country enjoy in that country. This status is usually that of Administrative and Technical Privileges and Immunities (P&I), i.e., not complete diplomatic immunity.

Other Legislation. Commanders should also be aware of country and issue-specific security assistance legislation. Examples of the latter include provisions that:

- limit or prohibit the provision of assistance to countries that violate human rights (*22 USC § 2304, Human Rights and Security Assistance*).
- prohibit the provision of security assistance to countries that illegally expropriate U.S. property.
- prohibit the provision of security assistance to countries that deliver nuclear enrichment or nuclear reprocessing equipment, materials, or technology to any other country, or receive such equipment, materials, or technology from any other country. The United States also denies security assistance to countries that transfer nuclear explosive devices to nonnuclear states. Nonnuclear weapon states that receive or detonate nuclear explosive devices likewise may not receive security assistance funds. These prohibitions are subject to limited exceptions that require the President to certify that termination of assistance to such a country would be detrimental to the national security of the U.S.
- completely stop foreign assistance to any country more than six months in arrears on payment of accrued debts to the U.S.

Deployment for Overseas Exercises.

Before overseas exercise deployments, the SJA must consider every aspect of the operation to ensure that planning addresses all potential legal issues. This process will closely parallel that required for deployment for conventional combat missions. Examples of this pre-exercise planning include:

- determining if international agreements exist between the U.S. and the host country; ensuring that if agreements exist, they contain essential provisions; and determining whether, in the absence of applicable agreements, such agreements should be negotiated;
- reviewing the exercise plan through the use of the OPLAN Checklist;
- preparing the legal annex to the exercise plan; and
- using the Deployment Checklist as a guide in order to assure that all exercise preparations are complete.

The expanded use of overseas training exercises requires the commander to be aware of legislation concerning construction activities, training activities, and exercise-related civic and humanitarian assistance undertaken in conjunction with overseas exercises.

Construction in Support of Training Exercises. Congress has passed legislation (*10 USC § 2805(a)(2) and (c),*

Unspecified Minor Construction), concerning the funding of exercise-related construction and unspecified minor military projects coordinated or directed by the JCS outside the U.S during any fiscal year.

Congress has also established certain guidelines for determining the cost of projects constructed in support of military training exercises:

- Transportation costs of materials, supplies, and government-furnished equipment are excluded.
- Travel and per diem costs applicable to troop labor and costs of material, supplies, services, and fuel furnished by sources outside of the Department of Defense on a nonreimbursable basis are excluded.

Congress has also reaffirmed a Comptroller General determination that the structures of a minor and temporary nature (such as tent platforms, field latrines, range targets, and installed relocatable structures) completely removed at the termination of an exercise may be funded through Operations and Maintenance O&M exercise accounts.

Given the evolving law and regulations applicable to exercise-related construction, theater operators and planners should consult with the unified command's legal adviser before planning exercise construction.

Training Activities. Units deployed on overseas exercises may familiarize host-nation forces with U.S. equipment for interoperability and safety purposes. The Army must meet security assistance requirements when the instruction before a combined exercise rises to a level of formal training comparable to that normally provided through security assistance. *10 USC § 2011, Special Operations Forces: Training with Friendly Foreign Forces,* permits U.S. special forces to conduct training missions with friendly foreign forces, provided the missions are designed primarily to train U.S. special operations forces.

Humanitarian and Civic Assistance (HCA) (10 U.S.C. § 401). The SJA is prepared to provide advice to commanders concerning the scope and nature of humanitarian and civic assistance that may be provided to nationals of a host country. *DOD Directive 2205.2, Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations,* and *DOD Instruction 2205.3, Implementing Procedures for the Humanitarian and Civic Assistance (HCA) Program,* implement the HCA program and give detailed procedures.

HCA activities are designed to promote foreign policy, the national security interests of the United States and the country where the HCA is carried out, and the specific operational readiness skills of the U.S. armed forces that participate in the activity. HCA consists of:

- medical, dental, and veterinary care provided in rural areas;
- construction of rudimentary roads and bridges;
- well drilling and construction of basic sanitation facilities; and
- rudimentary construction and repair of public facilities.

HCA may be provided only to those countries that are specifically approved by the Secretary of State acting upon DOD request.

Except for "minimal" expenditures, only funds specifically appropriated for HCA may be used for that purpose. O&M funds may be used for the minimal expenditures.

Smaller-Scale Contingencies (SSC).

SSC often occur within the context of one of three levels of conflict discussed below. The U.S. response to a given situation is based upon the level of the conflict and applicable international law. The SJA must advise commanders of the legal basis for U.S. responses to situations and the legal issues associated with security assistance programs and exercises conducted by the U.S. in conjunction with such responses. Examples of SSC include peace enforcement, peacekeeping, NEO, show of force, strikes, raids, counterinsurgency, counterterrorism, antiterrorism, counterdrug, nation assistance, disaster relief, and civil support. (See *Joint Pub 3-0: Doctrine for Joint Operations*, for a detailed discussion of these missions.)

Levels of Conflict. It may be useful to categorize conflict into three levels:

Level I—Disruptive Actions Against a Constituted Government. This level of conflict involves actions committed by individuals and small, loosely organized groups. They foment discontent through propaganda, protests, and demonstrations. They also engage in subversive, violent, and nonviolent acts of sabotage and/or terrorism.

The domestic law of the state applies to these individuals and groups. The state may treat them as common criminals, as their activities have no international legal status.

Third-party states may not aid those engaged in such activities. These states have a duty to prevent their territory from being used as a base of operations by those engaged in disruptive activities.

U.S. actions with the recognized government generally consist of security assistance, arms transfer programs, and combined training exercises.

Level II—Insurgency. Insurgencies are characterized by organized military operations against the constituted government. Insurgents may exercise *de facto* control over portions of a state's territory and portions of the population and may engage in all forms of disruptive activity against the constituted government.

The insurgents are treated in accordance with the law of the state. They are, however, protected by the provisions of common Article III of the 1949 Geneva Conventions.

Third-party states may not aid the insurgents, but may recognize that the insurgents exercise control over portions of the territory and population. In some cases, assistance to the constituted government may be viewed as illegal intervention. The legality of third-party state assistance to the constituted government may be largely dependent upon whether insurgent activity is externally supported or controlled. Just as in Level I, third-party states have a duty to prevent their territory from being used as insurgent bases of operations.

The U.S. may employ and exercise the full range of security assistance activities in support of the constituted government, and the use of U.S. combat/combat support forces on a unilateral or regionally collective basis may be required.

Level III—Belligerency. A conflict rises to the level of a belligerency when the insurgents have governmental and military organizations of their own, their military operations are conducted in accordance with the law of war, they have a determinate

percentage of territory and population under effective control, and the conflict becomes conventional in nature.

The law of armed conflict applies to belligerencies, which have similar status under international law as wars between sovereign states. Any assistance afforded to either belligerent by a third-party state constitutes an act of war against the other. Further, participation in the conflict by third-party states gives the conflict an international character requiring application of the international law norms of neutrality.

U.S. response may consist of appropriate unilateral or regional military actions. The U.S. may also participate in peacekeeping operations following a cease-fire in the conflict. *FM 100-20: Military Operations in Low Intensity Conflict*, and *JCS Pub 3-07.3: Joint Tactics, Techniques and Procedures for Peacekeeping,* describe categories of such operations and missions.

Special Operations. The Army must conduct all special operations in compliance with U.S. law, national policy, DOD directives, and Army regulations. U.S. law, regulations, and policy guidance apply to all U.S. Army personnel, whether performing special or conventional operations (*DA Policy on Special Operations, 10 July 1986*). JAs assigned to special operations units must actively participate in all phases of mission planning and execution to ensure compliance with applicable U.S. law and policy.

CONTRACT/FISCAL LAW

Overview. Contract law is the application of domestic and international law to the acquisition of goods, services, and construction. Fiscal law is the application of domestic statutes and regulations to the funding of military operations. The practice of contract and fiscal law includes battlefield acquisition, contingency contracting, bid protests and contract dispute litigation, procurement fraud oversight, economy act transfers, commercial activities, acquisition and cross-servicing agreements, and support to non-federal agencies and organizations.

The SJA's contract and fiscal law responsibilities include furnishing legal advice and assistance to procurement officials during all phases of the contracting process, to include advice on the labor, environmental, intellectual property, and tax law applicable to contractors; determining the proper use and expenditure of funds; overseeing an effective procurement fraud abatement program; and providing legal advice to the command concerning battlefield acquisition, contingency contracting, Logistics Civil Augmentation Program (LOGCAP), the commercial activities program, interagency agreements for logistics support, overseas real estate and construction, foreign military sales cases, and support to non-federal agencies and organizations.

Contract Legal Review.

Commanders should ensure that their contracting officers work closely with legal support. DA policy requires that legal counsel:

- participate fully in the entire acquisition process;
- participate as a member of the contracting officer's team, and advise as to the legal sufficiency of actions taken.

Legal counsel shall inform the contracting officer whether the proposed

action is legally sufficient, the details of any insufficiency, and a recommended course of action to overcome the insufficiency. The Head of Contracting Activities (HCA), ordinarily at MACOM level and higher, decides differences between the contracting officer and the legal counsel as to legal sufficiency that cannot be resolved at the contracting-office level. Other acquisition areas in which legal counsel may assist the commander include:

- bid protests by disappointed bidders;
- contract performance problems;
- contractor requests for equitable adjustment or contract modification;
- contract litigation pursuant to the "Disputes Clause" of a contract or pursuant to the Contract Disputes Act of 1978 (*41 USC §§ 601-613)*;
- issues relating to the Commercial Activities Program,
- issues relating to NAF contracting.
- issues relating to funding of Government contracts.

Fiscal Law.

The Constitution gives Congress the authority to raise revenues, borrow funds, and appropriate money for federal agencies. Under these express constitutional powers, Congress strictly limits the obligation and expenditure of public funds by the executive branch. Congress regulates virtually all executive branch programs and activities through the appropriations process. Violating congressionally enacted fiscal procedures subjects the offender to potential serious adverse personnel actions or even criminal penalties. There are three major fiscal limitations.

(1) An agency may only obligate and expend appropriations for a proper *purpose*;
(2) An agency must obligate within the *time* limits applicable to the appropriation (for example, O&M funds are available for obligation for one fiscal year); and
(3) The obligation must be within the *amounts* established by Congress.

Availability as to Purpose. The "purpose statute," *31 USC § 1301(a)*, provides that appropriations shall be applied only to the objects for which the appropriations were made, except as otherwise provided by law. DOD has nearly 100 separate appropriations available to it for different purposes. The statute does not require that an appropriation act specify every item of expenditure. DOD has discretion in determining how to accomplish the purpose of an appropriation. A particular expenditure not specified in the statute must meet one of the following criteria:

- Reasonably necessary in carrying out an authorized function.
- Will contribute materially to the effective accomplishment of the function.

By regulation, DOD has assigned most types of expenditures to a specific appropriation.

One common problem is the failure to use procurement appropriations properly. Operations and Maintenance (O&M) appropriations are generally available to pay for day-to-day operating costs. Procurement appropriations are required, however, when acquiring end items that are centrally managed or cost more than a specified amount.

Another common problem relates to proper use of "contingency funds." Contingency funds are appropriations made available to the executive branch that may be expended without the normal controls. Congress has provided contingency funds

throughout our history for use by the President and other senior agency officials. Contingency funds are tightly regulated because of their limited availability and potential for abuse. Official Representational Funds are available to extend official courtesies to dignitaries, officials, and foreign governments. Restrictions apply to using these funds for retirement and change of command ceremonies, classified and intelligence projects, entertainment of DOD personnel, personal expenses, and other related categories of expenses.

An additional area of concern is the use of O&M appropriations for military construction. Congressional oversight of the Military Construction Program is extensive and pervasive. Most construction projects costing $1.5 million or more require specific prior approval by Congress and funding under the Military Construction appropriation. The Unspecified Minor Military Construction, Army appropriation covers projects costing $500,000 to $1.5 million. Congress must still be notified before execution of those projects. Some projects under $500,000 may be presently funded with O&M funds. Maintenance and repair projects are funded using either O&M or, if applicable, Real Property Maintenance, Defense appropriations.

There is also a potential for misuse of O&M funds for improvements to family housing. Congress provides funds for the operation, maintenance, repair, and construction of military family housing in the annual Military Construction Appropriation Act. Each Family Housing Appropriation consists of two subappropriations, one for Operations and Maintenance, and one for Construction. All projects for new or replacement construction must be specifically authorized by Congress. Improvement projects exceeding statutory limits ($50,000 per unit per year, adjusted by an area cost factor; $60,000 for handicapped accessibility) also require congressional approval. Less costly improvement or maintenance and repair (M&R) projects are funded from the Family Housing Operations and Maintenance accounts. These projects may require MACOM and/or Department of the Army approval, depending on the type of work involved and the cost per dwelling unit. Different limits apply to improvement projects involving multiple dwelling units. Commanders responsible for family housing M&R work should consult with legal counsel and the Army Family Housing office to determine current cost limitations, required approval authority, and options for accomplishing the work.

Money spent on general officer quarters is closely scrutinized. Many general officer quarters are older and larger than the vast majority of family housing units. Many are also historic and architecturally significant. These factors tend to make these units the most expensive to operate and maintain. Chapter 13, *AR 210-50: Housing Management*, establishes detailed procedures for spending money on general officer quarters and must be consulted regularly. General officers are responsible for knowing how much money is spent to maintain their quarters, and must be familiar with cost limitations and approval authority levels. Accidental or intentional abuse may lead to allegations and embarrassing and expensive investigations.

Availability as to Time. Appropriations are available for limited periods. An agency must incur a legal obligation to pay money within the period of availability. If funds are not obligated before they expire, they are no longer available.

Appropriations are available to support bona fide needs of their period of availability. The "bona fide needs" statute, *31 USC § 1502(a*), provides that the balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability.

Supplies. Supplies are bona fide needs of the period in which they are needed. Orders for supplies are proper only when the supplies are actually required now. Thus, supplies needed for operations during a given fiscal year are bona fide needs of that year.

Supplies ordered in one fiscal period that will not be required until a subsequent fiscal period are bona fide needs of the first period under two circumstances:

- *The Inventory Exception.* A bona fide need for supplies exists when there is a present requirement for supply items to meet an authorized stockage level (replenishment of operating stock levels, safety levels, mobilization requirements, authorized backup stocks, etc.); and
- *The Lead-Time Exception.* If goods or materials will not be obtainable on the open market at the time needed for use because the time required to order, produce, fabricate, and deliver them requires that they be purchased in a prior fiscal year, such supplies are a bona fide need of the first year.

Services. As a general rule, services are presumed to be bona fide needs of the fiscal year in which they are performed. The proper appropriation is that available during the period in which the services will be rendered or delivered. There is a statutory exception to the general rule (see *10 USC § 2410a*). Defense agencies may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year. Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

Availability as to Amount. Appropriations are apportioned to agencies for obligation by Office of Management and Budget over their period of availability. Agencies subdivide these funds among their activities. In the Army, the Operating Agency/Major Command (MACOM) is the lowest command level at which the formal administrative subdivisions of funds required by *31 USC § 1517, Prohibited Obligations and Expenditures,* are maintained. Below the MACOM level, subdivisions are informal targets or allowances.

The Antideficiency Act, 31 USC §§ 1341, 1342, 1349, et seq., and 1517 et seq., prohibits any government officer or employee from:

- making or authorizing an expenditure or obligation *in excess* of the amount available in an appropriation;
- incurring an obligation *in advance* of an appropriation, unless authorized by law; or
- making or authorizing expenditures or incurring obligations *in excess* of *formal subdivisions* of funds; or more than amounts permitted by regulations prescribed under *31 USC § 1514(a)*.

- accepting unauthorized voluntary services from government employees or contractors (*31 USC §1342*).

Commanders who become aware of possible violations of the Antideficiency Act must investigate and report them promptly. If substantiated, the violation must be reported to the DOD, Congress, and the President.

Government Operations During Funding Gaps and Continuing Resolutions. During a continuing resolution, the Army is generally not allowed to initiate or increase the scope of existing programs, projects, and activities. Operations continue at the rate of funds available during the previous fiscal year, or at some specified lower amount. Army activities can expect to receive guidance from OMB and the Army Comptroller addressing what activities the Army can continue during the absence of appropriations. While certain employees and activities are exempt from Government suspension or shutdown during a funding gap, the Army must suspend other activities and may not accept voluntary performance of non-exempt services by non-exempt employees.

SUMMARY

Army JAs and civilian lawyers stand ready to advise commanders on myriad and complex legal issues that confront Army leaders every day. Commanders should form close professional relationships with the command legal advisor. SJAs can do much more than advise on the legality of an action. They can assist commanders accomplish legitimate command objectives, and provide sound advice and judgment.

REFERENCES

(1) Administrative *Control of Appropriations,* DOD Directive 7200.1.
(2) *DOD Law of War Program,* DOD Directive 5100.77.
(3) *Financial Management Regulation (FMR), Volume 10, Contract Payment Policy and Procedures,* and *Volume 14, Administrative Control of Funds and Antideficiency Act Violations,* DOD Directive 7000.14-R.
(4*) Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations,* DOD Directive 2205.2.
(5) *Implementing Procedures for the Humanitarian and Civic Assistance (HCA) Program,* DOD Instruction 2205.3.
(6) I*nternational Agreements,* DOD Directive 5530.3.
(7) *Joint Ethics Regulations (JER),* DOD Directive 5500.7-R.
(8) *Department of Defense Dictionary of Military and Associated Terms,* JCS Pub.1.
(9) *Doctrine for Joint Operations,* Joint Pub 3-0.
(10) *Joint Tactics, Techniques and Procedures for Peacekeeping,* JCS Pub 3-07.3.
(11) The *Law of Land Warfare,* FM 27-10.
(12) *Standing Rules of Engagement for U.S. Forces,* CJCS Instruction 3121.01.
(13) AR *27-3: The Army Legal Assistance Program.*
(14) AR *27-10: Military Justice.*
(15) AR *27-20: The Army Claims System.*
(16) AR *27-26: Army Rules of Professional Conduct for Lawyers*.
(17) AR *27-40: Litigation.*
(18) AR *210-50: Housing Management.*

(19) AR *550-51: Authority and Responsibility for Negotiating, Concluding, Forwarding, and Depositing of International Agreements.*
(20) AR *600-8-24: Officer Transfers and Discharges*
(21) AR *600-20: Army Command Policy.*
(22) AR *635-200: Enlisted Personnel.*
(23) AR *690-700: Personnel Relations and Services (Chapter 751).*
(24) *Civil Affairs Operations*, FM 41-10 .
(25) *Legal Operations*, FM 27-100.
(26) *Military Operations in Low Intensity Conflict*, FM 100-20.
(27) *Labor-Management Partnerships*, Executive Order 12871.
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(30) *Standards of Ethical Conduct for Employees of the Executive Branch*, The Office of Government Ethics (OGE).